



OCT 13 1943

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1943

No. 364

J. H. SMITH RICHARDSON and LUNSFORD RICHARDSON, JR.,  
Executors of the Last Will and Testament of Lunsford  
Richardson, Sr., deceased, and the VICK CHEMICAL COM-  
PANY, a corporation organized under the laws of the State  
of Delaware,

*Petitioners,*

vs.

ROBERT R. KING, SR., ROBERT G. VAUGHN, SR., and AUBREY  
L. BROOKS, sole Trustees for the Home and Foreign Mis-  
sions and Benevolent Causes of the Presbyterian Church  
under the Will of Lunsford Richardson, Sr., deceased;  
THE EXECUTIVE COMMITTEE OF HOME MISSIONS OF THE  
PRESBYTERIAN CHURCH IN THE UNITED STATES, a corpora-  
tion organized and existing under the laws of the State  
of Georgia; THE EXECUTIVE COMMITTEE OF MINISTERIAL  
EDUCATION AND RELIEF OF THE PRESBYTERIAN CHURCH  
IN THE UNITED STATES, a corporation organized and exist-  
ing under the laws of the Commonwealth of Kentucky; and  
THE PRESBYTERIAN COMMITTEE OF PUBLICATION, a cor-  
poration organized and existing under the laws of the State  
of Virginia; on behalf of themselves and all other bene-  
ficiaries, similarly situated, of the charitable trust created  
under Item V of the Will of Lunsford Richardson, Sr.,

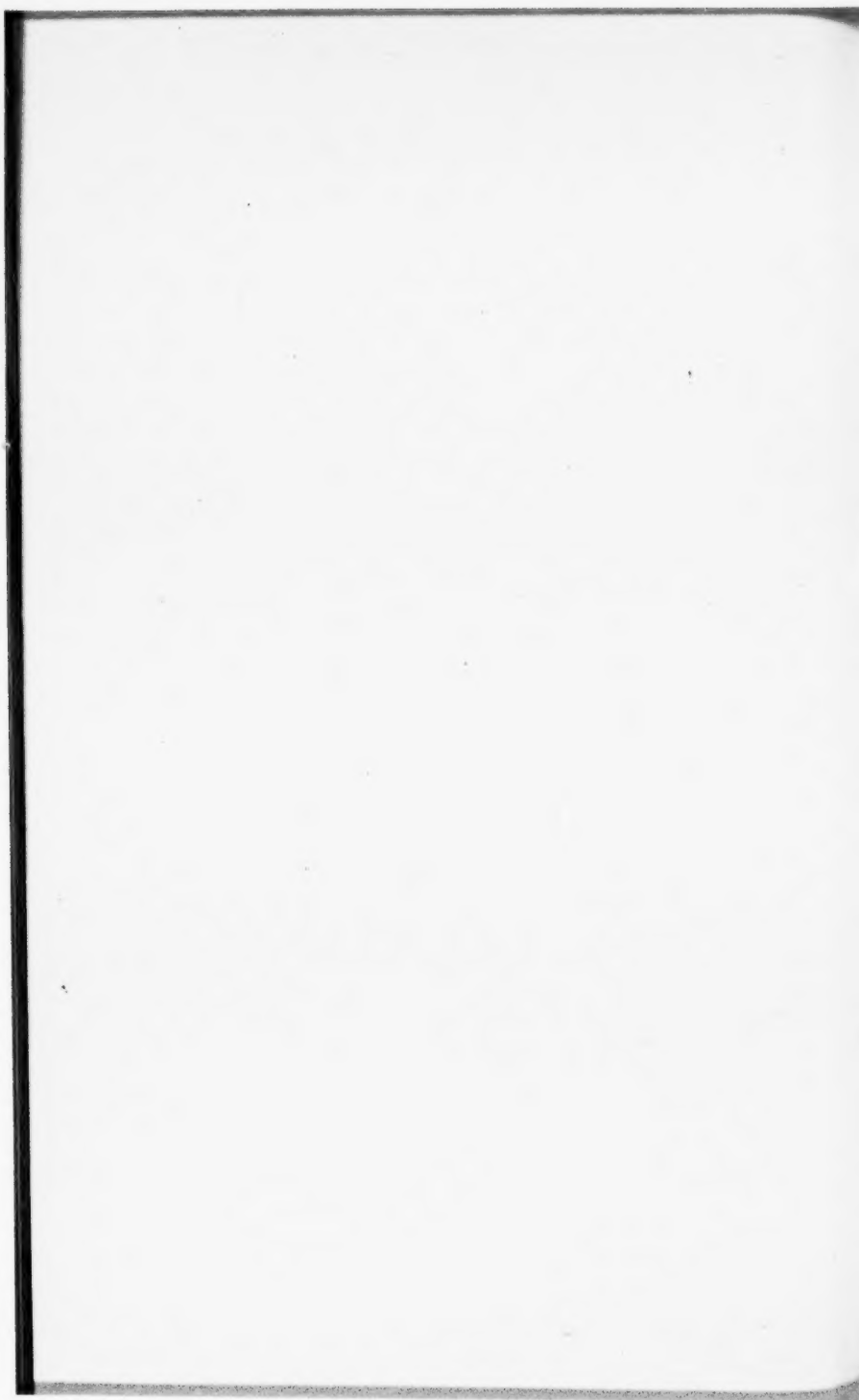
*Respondents.*

**BRIEF FOR RESPONDENTS IN OPPOSITION  
TO PETITION FOR CERTIORARI**

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**BRIEF FOR RESPONDENTS IN OPPOSITION  
TO PETITION FOR CERTIORARI**

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*To the Honorable the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

The respondents respectfully submit the following brief in  
opposition to the petition for certiorari, filed on September

17, 1943, by the defendants (petitioners) to review a judgment of the United States Circuit Court of Appeals, Fourth Circuit.

### Opinions Below

The opinion of Judge Johnson J. Hayes in the United States District Court for the Middle District of North Carolina (R. 6) is reported in 46 Fed. Supp. 510. The opinions of the Circuit Court of Appeals (R. 263) are reported in 136 Fed. (2d) 849.

### Summary Statement of the Questions of Law Involved

We agree with the petitioners that the petition for certiorari raises "only questions of law relating to the construction of a North Carolina will and the administration of a North Carolina estate." (Petition p. 4.).

### Summary of the Facts

The will in question was executed in 1917. For some time prior thereto Lunsford Richardson, Sr., the testator, had been engaged in the proprietary drug business and the preparation and marketing of Vick's Vapo-Rub. By December, 1917, his business was successful and he had associated with him as partners his two sons, giving to the defendant, H. S. Richardson, a thirty-five per cent interest, and the defendant, Lunsford Richardson, Jr., a fourteen per cent interest, retaining for himself a fifty-one per cent interest (Finding 1, R. 17).

The testator was a devout member of the First Presbyterian Church of Greensboro, North Carolina, and contributed liberally of his means to the benevolent causes of the Church. He was familiar with the Church organization, Church Order and Constitution of the Presbyterian Church in the United States, and from time to time attended meetings of the Presbytery, Synod, and General Assembly as a delegate or commissioner from his local church (Finding 2, R. 17). The benevolent causes of the Church were administered by corporate executive committees, the members of which were appointed by

the General Assembly and are identified and described in the Trial Court's Finding No. 3 (R. 17). The trustees designated in Item Fifth of the will and some of these benevolent causes are the plaintiffs herein. With these causes and the practice of the Church in supporting them the testator was thoroughly familiar (R. 12).

The testator died August 21, 1919. By his will he disposed of his  $51/100$  interest in the Vick Chemical Company by giving  $3/100$  interest to the defendant, J. H. S. Richardson,  $10/100$  to the defendant, L. Richardson, Jr., and  $10/100$  interest to each of his three daughters for life with remainder to their children, and the remaining  $8/100$  interest he disposed of by Item Fifth of his will, reading as follows:

"Fifth: I give and bequeath to my beloved wife, Mary Lynn Richardson, eight one-hundredths interest in the Vick Chemical Company. At the death of my said wife it is my desire that of the said eight one-hundredths interest so devised to her, three one-hundredths thereof shall be and become absolutely the property of the Trustees of the First Presbyterian Church, and the profits or dividends arising therefrom shall be used by the said Trustees for the benefit of Home and Foreign Missions and the benevolent causes of the church, in such proportion as the Trustees deem best. The remaining five one-hundredths interest I desire to be distributed equally among my five children, herein named, each receiving one share thereof in fee simple." (R. 265.)

The individual defendants, J. H. S. Richardson and L. Richardson, Jr., and their mother qualified as Executors. No order has been entered discharging the Executors and no successor-executor was appointed upon the death of Mrs. Richardson on July 16, 1940 (Finding 6, R. 19).

The legacy in question consisted of 450 shares, 225 shares of which were sold to the Vick Chemical Company in May, 1921. (The plaintiffs were denied recovery in the courts below of the 225 shares so sold).



In 1922, the following letter was written over the signature of Mrs. Richardson. (The words "of the trustees" in the original having a line drawn through them):

"PLAINTIFFS EXHIBIT NO. 9 LETTER MRS. RICHARDSON TO SESSION—NOVEMBER 10, 1922:

118 Smith St.,  
Nov. 10-22

Mr. H. Barton, Clerk of Session  
First Pres. Church  
Dear Mr. Barton:

You will recall that Mr. Richardson, in his will, left to the 1st Pres. Church at my death, three one-hundredths of the stock of the Vick Chem. Co.—that is, 225 shares—'to become absolutely the property ~~of the Trustees~~ of the 1st Pres. Church, and the profits, or dividends arising therefrom, shall be used by the said Trustees for the benefit of Home and Foreign Missions and the benevolent causes of the church, in such proportion as the Trustees deem best.'

I have been thinking a great deal lately, of this bequest, and wish to present to the Session my ideas thereon.

This stock will not come into the possession of the church until my death, but it seems to me that the church needs money now, more than it will later. In addition, I am very much interested in seeing that some part of the church which Mr. Richardson loved so well, be identified with his name and that this be done now, before those who knew, and loved, him have passed away.

In talking this over with my son, H. S. Richardson, he said it could be done, by the Vick Chem. Co. buying the rights to these 225 shares, if a price, mutually agreeable, could be arrived at.

I am also very much interested in Davidson College, and the family is now making gifts to the College, which will also become a memorial to Mr. R. Therefore, if this plan is carried out, I would wish:

1st. That at least \$5000.00 of whatever price is agreed upon be given by the 1st Pres. Church to Davidson College, to be added to the L. Richardson Memorial Fund there.

2nd. That some part of the new church, into which I suppose this money will go, will bear Mr. R.'s name and be a permanent memorial to him.

3rd. Mr. Richardson's wishes were, that the income or profits from this stock go for the benefit of Home and Foreign Missions and the Benevolent Causes of the Church. I feel, however, that he would thoroughly approve of this transaction provided these three causes should not suffer.

Can anything be worked out along this line?

The above is merely a suggestion which I am glad to submit for your consideration.

Very truly yours,  
MARY LYNN RICHARDSON." (R. 57)

Thereafter, on December 17, 1922, a report of the special committee of the Elders and Deacons of the First Presbyterian Church recommended the acceptance of Mrs. Richardson's offer. Said report was adopted (Findings 24, 25, R. 27, 28).

Without any prior consultation whatsoever between the Trustees of the Church and the Richardsons or the special committee, the Trustees, on or about March 8, 1923, executed a Bill of Sale to Mrs. Richardson in consideration of the sum of \$45,000, which had been paid by her on February 28, 1923 (Finding 26, R. 29 and 58).

The purchase price was not used for the purposes of the trust but was diverted to the building of a new church and the payment of a subscription by the Richardson family to Davidson College (R. 286).

"The apparent purchaser of the 3/100 interest from the First Presbyterian Church or its trustees was Mrs. Mary Lynn Richardson. The real purchaser, however, was H. S. Richardson (91 shares), Lunsford Richardson, Jr. (58 shares) and their three sisters (25 shares each). A plan had been formulated by these real purchasers by which they had already agreed before the transaction was entered into to take over from the said Mary Lynn Richardson, either directly or through the Vick Chemical Company, the said stock interest that she was acquiring from the church or its trustees." (Finding 27, R.

29). "Not until the true facts were established by the evidence in this trial was it known who the real purchasers of the remainder interest from the church or its trustees were . . ." (Finding 27, R. 30).

No stock certificate was ever issued by the Vick Chemical Company to Mrs. Mary Lynn Richardson in her own name representing the 3/100 interest bequeathed in Item Fifth of the testator's will nor did any certificate issued to Mrs. Richardson for any amount show her limited ownership as life tenant and indicate who the owner of the remainder interest was (Finding 13, R. 22).

The corporation "was a family or closed corporation" (Finding 14, R. 23). Not until March 12, 1921, were any certificates representing any of the testator's stock issued, and on that date a certificate for the testator's 51/100 interest was issued to "H. S. Richardson, L. Richardson and Mrs. Mary Lynn Richardson, Executors and Trustees," and the stock transfer books so remained until after the attempted purchase of the stock in controversy in 1923 (Finding 12, R. 22 and R. 39).

On February 28, 1923, the 225 shares were issued to the individual defendants and their three sisters, as above stated (R. 39). While acting as President and Vice-President of the corporation and as Executors and Trustees under the will, the individual defendants procured the transfer of the 225 shares to themselves and their sisters individually (at that time they were the only stockholders of the company) before the Trustees of the Church were ever consulted or the Bill of Sale presented to them for execution on March 8, 1923 (R. 39, Finding 26, R. 29).

The Trial Court in its opinion concludes "According to the evidence produced in this court the price was inadequate" (R. 15). For the fiscal year ending June 30, 1923, the net profits of the corporation were \$2,568,855.53, and the total number of shares outstanding was 7500 (R. 41). The Circuit Court of Appeals did not find that the remainder interest in

the 225 shares in controversy was worth \$26,000 as stated on page 5 of petitioners' brief (R. 268).

"From the date of their qualification as Executors on October 20, 1919, to the dissolution of Vick Chemical Company (N. C.) on November 7, 1923, the position of the Executors on the one hand and the owners, officers and managers of the family-owned corporation, Vick Chemical Company, on the other hand, was interlocked and mutual to such extent that the knowledge, information and interest of one was the knowledge, information and interest of the other, and vice versa. As to all of the dealings and transactions between the executorship and Vick Chemical Company, the one merely acted as the alter ego or agent of the other, and vice versa." (Finding 15, R. 23).

The court below found that the Vick Chemical Company, whose stock constituted the legacy in controversy, has undergone many changes since 1923, but essentially it has remained the same corporate enterprise with substantially the same officers (R. 14).

Both the Trial Court and the Circuit Court held that there was a breach of the trust. A copy of the will was in the records of the corporation (R. 275-6).

The life tenant, Mary Lynn Richardson, died July 16, 1940, and this action was instituted in the District Court on June 25, 1941 (Finding 32, R. 34).

It is conceded that the beneficiaries of the trust (Home and Foreign Missions and the benevolent causes of the church) had no notice of the attempted sale and have received nothing from the bequest.

### **The Petitioners Are Not Entitled to the Writ**

The petition does not justify the issuance of the writ. It fails to show that an important question of local law has been decided by the Circuit Court of Appeals. The questions of law involved are not of general public interest and do not fall "within the category of questions of such gravity and general

importance as to require a review of the conclusion of the Circuit Court of Appeals." The decisions of both the Trial Court and the Circuit Court of Appeals are but applications of the principles of North Carolina law to the facts in this case. The decision of the Circuit Court of Appeals was not based upon any new or novel principles of law but followed the statutes of North Carolina and the decisions of the Supreme Court of that State. Under the applicable rules and decisions of the Supreme Court the writ should not be granted.

*Magnum Import Co. v. Coty*, 262 U. S. 159, 67 Law ed. 924.

*Bailey v. Central Vermont Rwy.*, 87 Law ed. (Adv. Op.) 1030.

As to each point advanced by the petitioners by way of argument that the decision of the Circuit Court of Appeals is "probably in conflict with applicable local decisions," we invite the Court's consideration of the fact that the Trial Judge is a North Carolina lawyer of long experience at the bar and on the bench, and the Senior Circuit Judge, who wrote the opinion of the Circuit Court, is also a North Carolina lawyer of long experience and great learning.

# 1

## Petitioners' Contention that the Gift Was Outright to the First Presbyterian Church of Greensboro.

The answer to this contention is that both the Trial Court and the Circuit Court of Appeals construed the will by the application of well-settled principles of North Carolina law set forth in the decisions of the Supreme Court of that State and contained in its statute law.

The following statute of North Carolina is pertinent:

"C. S. 4035 (a) (Chap. 264, Sec. 1, Public Laws 1925):  
*"Indefiniteness; title in trustee; vacancies.*—No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or

for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be invalid by reason of any indefiniteness or uncertainty of the object or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purpose thereof, or by reason of the same in contravening any statute or rule against perpetuities. If a trustee or trustees are named in the instrument creating such a gift, grant, bequest or devise, the legal title to the property given, granted, bequeathed or devised for such purpose shall vest in such trustee or trustees and its or their successor or successors duly appointed in accordance with the terms of such instrument. If no trustee or trustees be named in said instrument, or if a vacancy or vacancies shall occur in the trusteeship, and no method is provided in such instrument for filling such vacancy or vacancies, then the Superior Court of the proper county shall appoint a trustee or trustees, pursuant to section four thousand and twenty-three, of the Consolidated Statutes of North Carolina, to execute said trust in accordance with the true intent and meaning of the instrument creating the same. Such trustee or trustees when so appointed shall be vested with all the power and authority, discretionary or otherwise, conferred by such instrument."

The following decisions of the Supreme Court of North Carolina are controlling and were followed by the court below:

- Williamson v. Cox*, 218 N. C. 177, 10 S. E. (2d) 662.
- Thornton v. Harris*, 140 N. C. 498, 53 S. E. 341.
- Witherington v. Herring*, 140 N. C. 495, 53 S. E. 303.
- Hass v. Hass*, 195 N. C. 734, 143 S. E. 541.
- Ladies Benevolent Society v. Orrell*, 195 N. C. 405, 142 S. E. 493.
- Thomas v. Clay*, 187 N. C. 778, 122 S. E. 852.
- McLeod v. Jones*, 159 N. C. 74, 74 S. E. 733.
- Keith v. Scales*, 124 N. C. 497, 32 S. E. 809.

It will be noted from the opinions of the Trial Judge and the Circuit Court of Appeals that a number of other North

Carolina Supreme Court decisions relied upon by the petitioners (defendants below) were considered and distinguished upon their facts from the instant case.

The petitioners' argument that the statutes of North Carolina (C. S. 3568-71) operate to compel the trustees to take the bequest for the local church is fully answered by the decision of the Circuit Court of Appeals (R. 270-1) and the case of *Thornton v. Harris, supra*.

## 2

### **The Petitioners' Contention That the Sale Was Invalid and Unenforceable.**

On this point the Circuit Court of Appeals applied the principles repeatedly enunciated by the Supreme Court of North Carolina, some of the decisions being as follows:

*Ward v. Brandt*, 62 N. C. 71.  
*Bailey v. Wilson*, 21 N. C. 182.  
*Lockhart v. Phillips*, 36 N. C. 342.  
*Lemly v. Atwood*, 65 N. C. 46.  
*Pritchard v. Williams*, 175 N. C. 319, 95 S. E. 570.  
*Spence v. Pottery Co.*, 185 N. C. 218, 117 S. E. 32.  
*Nissen v. Baker*, 198 N. C. 433, 152 S. E. 34.

As pointed out in the opinion of the Circuit Court, the principles of North Carolina law governing this aspect of the case are in conformity with the principles quite generally recognized by other courts including the Supreme Court of the United States. It is quite manifest that the case of *Carswell v. Crestwell*, 217 N. C. 40, is not applicable to the facts in the instant case, and likewise the statutes of North Carolina cited by the petitioners afford no defense to the defendants.

## 3

### **The Petitioners' Contention That the Action is Barred Under North Carolina Law.**

The court below carefully considered the same contentions now made by the petitioners with respect to the applicability of

the North Carolina statutes of limitations and followed the well-settled law of North Carolina as stated by its Supreme Court in numerous decisions, some of which are:

*Wooten v. Wilmington W. R. Co.*, 128 N. C. 119, 38 S. E. 298.

*Joyner v. Futrelle*, 136 N. C. 301, 48 S. E. 649.

*Baker v. Railroad*, 173 N. C. 365, 92 S. E. 170.

*Pritchard v. Williams*, 175 N. C. 319, 95 S. E. 570.

*Baggett v. Lanier*, 178 N. C. 129, 100 S. E. 254.

The cases and statutes cited by the petitioners were argued in the Circuit Court and that court held that they were not applicable to the facts in this case.

#### 4

#### The Petitioners' Contention That the Corporation is Under No Liability to the Respondents.

On this point the petitioners misinterpret the North Carolina statute, C. S. 1864-g (In Appendix to Petitioners' Brief). It will be noted that the statute fixes liability "when registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or with knowledge of such facts that the action in registering the transfer amounts to bad faith." The very authority which the petitioners cite, 1 North Carolina Law Review, 291, states the exact opposite of the petitioners' position in the following language:

"This section (C. S. 1864-g) does not apply to cases where the stock is held in the name of the principal or in the name of a decedent and the executor or administrator wishes to transfer to himself or to a third person."

In this connection, the Third Circuit Court of Appeals, in the case of *Seymour v. National Biscuit Company*, 107 Fed. (2d) 58, cites with approval the North Carolina case, *Baker v. Atlantic Coast Line Railroad*, 173 N. C. 365, as the law of North Carolina.



The liability of the corporate defendant rests upon North Carolina Supreme Court decisions, some of these being:

*Baker v. Railroad*, 173 N. C. 165, 92 S. E. 170.  
*Wooten v. Railroad*, 128 N. C. 119, 38 S. E. 298.  
*Cox v. Nat. Bank of Wilson*, 119 N. C. 302, 26 S. E. 22.  
*Edwards v. McLawhorn*, 218 N. C. 543, 11 S. E. (2d) 562.

The petitioners' argument that the corporate defendant, Vick Chemical Company of Delaware, is not responsible for the liabilities of its predecessors is fully answered by the Finding of Fact No. 29 made by the Trial Court, reading in part as follows:

"Each and every successor corporation as outlined above likewise became chargeable with the liabilities of its predecessor corporation, and the defendant, Vick Chemical Company (Del. 1933) is chargeable in law for the liabilities, if any, of Vick Chemical Company (N. C. 1919)."

This finding and conclusion is sustained by many precedents:

*McIver v. Hdwe. Co.*, 144 N. C. 478, 57 S. E. 169.  
*Gilmore v. Smathers*, 167 N. C. 440, 83 S. E. 823.  
*Northern Pacific R. R. Co. v. Boyd*, 228 U. S. 481, 57 Law ed. 931.

The most casual reading of the case of *McAlister v. Express Co.*, 179 N. C. 556, 103 S. E. 129, cited by the petitioners, shows that it is not authority for relieving the corporate defendant of liability under the facts of this case.

In conclusion, we think the following excerpt from the opinion of the Circuit Court of Appeals conclusively disposes of every point raised by the petitioners in their application for the writ of certiorari:

"We may assume, as defendants argue, that the trustees were vested with a power of sale with respect to corpus of the trust estate; but this becomes entirely immaterial

under the admitted circumstances of the case. Granting that the trustees had a power of sale with respect to the trust property, it was a power which they could lawfully exercise only for the purposes of the trust, and when it was exercised in derogation thereof, to the knowledge of the purchaser, the latter took the property subject to the trust. There can be no question but that the sale was made in breach of the trust to obtain funds for the new church building; that it was made pursuant to a prior arrangement that the proceeds of the sale should be used for that purpose, and Mrs. Richardson and her children, to whom the stock was transferred, were parties to the arrangement. The Vick Chemical Company, in making the transfer on its books, was likewise chargeable with knowledge of the trust and that the transfer was in violation thereof; for testator's will had been made a part of its record and all of its officers and stockholders, who at that time consisted of the members of the Richardson family, knew that the transfer was being made in violation of the trust created by the will." (R. 275.)

Respectfully submitted,

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